WORLDWIDE LASER SERVICE CORP

v.

EXCEL ELECTRONICS & INDUSTRIAL SUPPLIERS SDN BHD

HIGH COURT MALAYA, SHAH ALAM
ABDUL WAHAB PATAIL J
[CIVIL APPEAL: 12-18-1997]
16 JUNE 1997

CIVIL PROCEDURE: *Appeal - Memorandum of appeal - Whether memorandum of appeal to be filed - Rules of the High Court 1980, O. 55 r. 2 - Subordinate Courts Rules 1980, O. 49 r. 6(3)*

The appellant filed this appeal under O. 49 r. 6 of the Subordinate Courts Rules 1980 ('SCR'). Pursuant to O. 49 r. 6(3) of the SCR 1980, the appellant filed his record of appeal. The notice of appeal was filed on 1 February 1997 and the record of appeal on 20 February 1997. The sealed copy of the order was extracted on 26 February 1997. Between 3 and 4 March 1997, counsel received a letter from the Registrar of the Sessions Court Shah Alam dated 3 February 1997 advising that the sessions court would not be providing the notes of evidence and the grounds of decision.

The appellant then applied to this court, *inter alia* for directions as to whether the Sessions Court, Shah Alam was obliged to provide the appellant a certified true copy of the notes of evidence, grounds of decision and Form 141 under the SCR; and whether the appellant needed to file a memorandum of appeal. The issue of the memorandum of appeal arose because O. 55 r. 2 of the Rules of the High Court 1980 ('RHC') requires the filing of the memorandum of appeal in the High Court whereas O. 49 r. 6(3) of the SCR expressly provides that the record of appeal shall not include 'the notes of evidence, the grounds of judgment of any memorandum of appeal'.

Held:

[1] Order 55 of the RHC covers areas from the entry of appeal upon receiving of a record of appeal to memorandum of appeal, notice of cross-appeals, amendments, appearance, withdrawal, certain notices, interests, judgments and transmission of a certified copy thereof to the court below, stay of execution, and appeals from other persons or body of persons.

[2] Drafters of O. 49 r. 6 of the SCR, acting under the powers of the SCR Act 1955, had the objective of devising a speedy short cut for appeals to the High Court from decisions other than that made after the trial. Order 49 was concerned with the preparation of the records of appeal. Rule 6 thereof, when introduced, sought to do away with the notes of evidence and the grounds of the decision, being the two matters seen as the cause of the delay in bringing appeals to the High Court.

[3] Since the record of appeal is prepared by counsel himself, there is no requirement for the notice in Form 141 of the SCR to be given by the Subordinate Court to tell him that the notes of evidence and grounds of decision are ready.

[4] Based on the purposive approach, the interpretation of O. 49 r. 6 of the SCR is that appeals under the provision is by way of re-hearing. In such appeals, because the notes of evidence and the grounds of decision are prepared, a memorandum of appeal is therefore properly and reasonably required.

[5] The reasons for the requirement of the memorandum of appeal are to: (i) point out errors for future guidance of the subordinate court, where the latter had erred; (ii) it gives notice to the respondents of the grounds of appeal so that the respondent comes prepared to deal with the arguments raised; (iii) it serves to focus submissions to the mistakes.

[6] Based on the inherent power of the court however, the appeal should be heard on the basis of the record of appeal without further requirement of notes of proceedings, grounds of decision and memorandum of appeal.

[Order accordingly.]

Cases referred to:

Kemajuan Hunda Kredit (Kuching) Sdn Bhd v. Titus Chuo Mui Ing [1995] 2 CLJ 102 ***(refd)***

Pembinaan Nadzri Sdn Bhd v. Koon Hoe & Co Sdn Bhd [1996] 2 CLJ 1038 ***(refd)***

Perdana Finance Bhd v. Azmi Ahmad & Ors [1997] 2 CLJ 325 ***(not foll)***

Regina v. Leicester Crown Court, ex p Phipps (Times Law Report, 22 April 1977) ***(refd)***

Sykt Kayu Bersatu Sdn Bhd & Ors v. UMW (Sarawak) Sdn Bhd [1995] 1 CLJ 113 ***(not foll)***

Tan Ah Tee & Anor v. Paimon bin Kasiran [1996] 3 CLJ 313 ***(refd)***
Thye Ye Ind Sdn Bhd v. Malaysia Coconut Coir Industrial Co [1996] 3 AMR 3908 ***(refd)***
Yupaporn Seangarthit v. Neil Allan Campbell Webb [1996] 1 CLJ 43 ***(not foll)***

Legislation referred to:
Rules of the High Court 1980, O. 55 r. 2, O. 92 r. 4
Subordinate Courts Rules 1980, O. 49 r. 6(3)

For the plaintiff - S Sivaneindran; M/s Cheah Teh & Su
For the respondent - Suhaimi; M/s Meng & Assoc

Reported by Mariette Peters-Goh

JUDGMENT

Abdul Wahab Patail J:

The appellant, unhappy with the summary decision of the judge of the Sessions Court, Shah Alam, filed this appeal under O. 49 r. 6 of the Subordinate Courts Rules 1980. Pursuant to O. 49 r. 6(3) of the said Rules, the appellant filed his record of appeal.

The notice of appeal was filed on 1 February 1997 and the record of appeal on 20 February 1997. The sealed copy of the order was extracted on 26 February 1997. Between 3 and 4 March 1997, counsel received a letter from the registrar, Sessions Court Shah Alam dated 3 February 1997 advising that the Sessions Court would not be providing the notes of evidence and grounds of decision.

The appellant has then applied to this court for orders as follows:

1. That the appellant be allowed to file additional record of appeal to include the sealed order of 20 January 1997.

2. That the appellant be allowed to file and serve the additional record of appeal within 14 days from the date of the order.

3. Directions as to whether the Sessions Court Shah Alam is obliged to provide to the appellant a certified true copy notes of evidence, grounds of decision and Form 141 under the Subordinate Courts Rules 1980; and whether the appellant needs to file a memorandum of appeal.

4. In the event the court directs that the Sessions Court is so obliged, directions to the said court to provide the documents.

5. In the event the court directs that the Sessions Court is not so obliged, to set down the date to hear this appeal.

6. Costs in the cause.

7. Such other relief as the court thinks fit.

The first two prayers above refers to the sealed copy of the order made on 20 January 1997 which was extracted on 26 February 1997. There is no need for this application since there is a practice direction issued to allow filing of the sealed order without making further application. The practice direction had been issued for the purpose of saving time and cost. That being the case these two prayers are not necessary and may be filed without further order.

Prayer 3 is somewhat more involved.

Order 49 r. 6 of the Subordinate Courts Rules 1980 (SCR) provides:

1. Notwitstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the court other than a decision made after trial.

2. The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.

3. Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of:

   (a) the application for the decision;

   (b) the statement of claim, and where defence has been filed, the statement of defence;

   (c) all affidavits filed in support of or in opposition to the application; and

   (d) the decision appealed from;

   but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

Order 55 of the Rules of the High Court 1980 (RHC) made provision for dealing in the High Court, of appeals from subordinate courts and statutory bodies, covering areas from the entry of appeal upon receiving of a record of appeal to memorandum of appeal, notice of cross-appeals, amendments, appearance, withdrawal, certain notices, interest, judgment and transmission of a certified copy thereof to the court below, stay of execution, and appeals from other persons or body of persons. For the moment it is useful to read the first two rules under O. 55 RHC. They provide as follows:

1. Entry of Appeal

On receiving an appeal record (under O. 49 of the Subordinate Court Rules 1980) the Registrar shall enter the appeal in a list of appeals from Subordinate Courts.

2. Memorandum of Appeal

(1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under O. 49 r. 2 sub-r. (4) or r. 3 sub-r. (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.

(2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.

Order 55 r. 2 RHC requires the filing of a memorandum of appeal in the High Court in duplicate in Form 113A. Yet O. 49 r. 6(3) SCR expressly provides the record of appeal shall not include "the notes of evidence, the grounds of judgment or any memorandum of appeal". Thus arises the confusion as to whether in appeals under O. 49 r. 6 SCR, a memorandum of appeal is necessary.

Yupaporn Seangarthit v. Neil Allan Campbell Webb [1996] 1 AMR 197 CA; [1996] 1 CLJ 43 CA; [1996] 2 MLJ 705 CA is often referred to as the authority for the proposition that in appeals under O. 49 r. 6 SCR the appellant would have to file, after the record of appeal under O. 49 r. 6(3) SCR has been filed in the High Court, the notes of evidence, grounds of decision and a memorandum of appeal.

Mahadev Shankar JCA, approving the decision of Malanjum J in *Sykt Kayu Bersatu Sdn Bhd & Ors v. UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113 said:

> The amendment to O. 49 r. 6 was brought into effect by PU(A)193/93. Its objective was to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in the lower Courts. So for orders obtained before trial parties were allowed to compile the record by merely including the pleadings, affidavits, and the decision appealed from together with the written application therefor. Once the appeal was registered, the grounds of judgment and notes of evidence could come later.

His Lordship held that although O. 49 r. 6 SCR could have been more clearly worded, it cannot be understood to mean that it has abrogated the requirement of O. 55 r. 2 RHC. Thus following the Sarawak case, in an appeal under O. 49 r. 6 SCR, a notice of appeal in Form 140 SCR would have to be filed and the subordinate court would in due course issue the necessary notice under Form 141 SCR, and that an appellant must comply also with O. 55 RHC and file a memorandum of appeal.

In the wake of the decision in *Yupaporn Seangarthit,* there has been divergent decisions in the High Court as to whether, in order to proceed with the appeal, notes of proceedings and grounds of decision has to be made up and filed in the High Court.

Yupaporn Seangarthit was followed in *Tan Ah Tee & Anor v. Paimon bin Kasiran* [1996] 3 AMR 4043; [1996] 3 CLJ 313 HC and *Thye Ye Ind Sdn Bhd v. Malaysia Coconut Coir Industrial Co* [1996] 3 AMR 3908 HC. In *Tan Ah Tee & Anor v. Paimon bin Kasiran* it was held that:

> ... an appeal to the Judge in Chambers could not be heard unless the certified copy of the notes of evidence, and the certified copy of the written judgment, or the certified copy of the grounds of decision, are made available to the Judge.
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> (d) Once those documents are ready the court to whom the appeal was lodged shall notify the appellant in Form 141 and within 14 days from the date of service of the notice in Form 141, the appellant shall file in the High Court registry in duplicate a memorandum of appeal in Form 113A as provided under O. 55 r. 2 (1) of the RHC. Time does not set in for the appellant until they are in receipt of Form 141. Consequently, the appeal in this case was not properly before the court.
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> (e) It would be an absurdity to require a court to hear an appeal in the absence of certified copy of the notes of evidence, the certified copy of the written judgment or the certified copy of the grounds of decision, and the memorandum of appeal. The filing of these documents as specified in O. 49 r. 6(3)(a), (b) (c) and (d) of the SCR are insufficient to move this court to hear the present appeal.

(f) In giving effect to O. 49 r 6(3)(a), (b), (c) and (d) of the SCR, the court can, in exercise of the inherent powers, under O. 92 r 4 of the RHC, prevent injustice to the appellants. The appellants/defendants in the present appeal have yet to obtain Form 141. Only on receipt of Form 141 will the appellants be able to file their memorandum of appeal within 14 days from receipt of Form 141.

(g) In view of the gray areas surrounding the interpretation of O. 49 r. 6(3) of the SCR, the court should not proceed to hear the appeal. The appeal should be adjourned to enable the appellants to file an application for an extension of time to file the memorandum of appeal after receipt of the notice in Form 141. In the meantime, the learned magistrate should proceed to write his grounds of judgment and supervise the preparation of the notes of proceedings to enable Form 141 to be issued. (AMR headnotes)

On the other hand Kadir Musa JC (as he then was) in *Pembinaan Nadzri Sdn Bhd v. Koon Hoe & Co Sdn Bhd* [1996] 2 CLJ 1038; [1996] 2 AMR 2618, held that in respect of an appeal from a subordinate court decision, other than that after a trial, there is no need to file a memorandum of appeal. The decision in *Pembinaan Nadzri Sdn Bhd* was, mildly speaking, not followed in *Perdana Finance Bhd v. Azmi Ahmad & Ors* [1997] 2 CLJ 325 HC where Hishamudin Yunus J held himself bound by *Yupaporn Seangarthit.*

Yupaporn Seangarthit as quoted above expressly recognised the objective of O. 49 r. 6 SCR to expedite such appeals. That case cannot then be read as to contradict itself and negate or deny that objective by requiring that in every appeal under O. 49 r. 6 SCR the notes of evidence, grounds of decision and a memorandum of appeal has to be filed in addition to the record of appeal under O. 49 r. 6(3) SCR. In *Yupaporn Seangarthit*, Form 141 had in fact been served on the appellant's solicitors on 3 January 1994. In other words, the notes of evidence and grounds of decision were available. Form 141 having been issued, O. 55 RHC is triggered into operation.

It is trite that the *ratio decidendi* of a case is limited to the legal principle enunciated and applied to the factual situation of a case. That situation could be specific or general. But legal principles discussed or stated in the course of reasoning, but not necessary to the factual situation of that case is only *obiter dicta*. *Prima facie* the *dicta* of a superior court is persuasive and must be considered. The *ratio decidendi* of *Yupaporn Seangarthit* if applied too generally would contradict the reason for introduction of O. 49 r. 6 SCR which was specifically recognised by *Yupaporn Seangarthit* itself. It would be a misreading of the judgment of the Court of Appeal that it would contradict itself. The only consistent reading is that where

Form 141 has been served on the appellant's solicitors, they should follow up with obtaining the notes of evidence, grounds of decision and filing the same with a memorandum of appeal, and applying for extension of time if necessary, to do so.

Yupaporn Seangarthit did not have to consider the case where the subordinate court had notified it will not issue Form 141 and that there would be no notes of evidence and grounds of decision prepared. If indeed *Yupaporn Seangarthit* intended to deal with such cases, its pronouncements is only *obiter dicta*. In this I regret I must humbly differ from *Perdana Finance Bhd* in this aspect.

Persevering with the ponderous language in which he endeavoured to render his reasons for his conclusions, I would venture the following as a summary of the essential reasons given by Kadir Musa JC in *Pembinaan Nadzri Sdn Bhd*:

1. That *Sykt Kayu Bersatu Sdn Bhd & Ors*, starting from the premise the case would be dismissed summarily since there was no memorandum of appeal, but holding it would be unfair to the appellants since the subordinate court had not issued Form 141 to them, directed the subordinate court and the appellant to comply with procedural requirements.

2. Those procedural requirements in fact are the provisions of O. 49 r. 6(3) SCR which specifically excluded the notes of evidence, the grounds of judgment or any memorandum of appeal.

3. *Sykt Kayu Bersatu Sdn Bhd & Ors* recognising there are no reciprocal provisions to O. 49 r. 6 SCR in O. 55 RHC; and holding that the SCR could not govern proceedings in the High Court, concluded an appellant must comply with the requirements of both SCR and RHC separately. But then *Sykt Kayu Bersatu Sdn Bhd & Ors* failed to state what were the provisions of O. 55 RHC that should not be ignored.

4. The issue with regard to authoritativeness of *Sykt Kayu Bersatu Sdn Bhd* & Ors is that relevant issues were not discussed adequately, or if they were, whether the issues were examined and decided in line with the true legislative intent of the two Orders.

5. Both SCR and RHC have equal legislative force, having been drafted by their relevant Rules Committees.

6. Since in interpretation words must take their colour of meaning from the context they appear; and reading in the context of O. 49 SCR, O. 49 r. 6 is an exception to the other provisions of O. 49 SCR which relates to appeals after a trial.

7. Order 49 r. 6 was introduced, as recognised by *Yupaporn Seangarthit* itself, to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in the lower courts. If this was recognised in *Sykt Kayu Bersatu Sdn Bhd & Ors* and considered as the true legislative intent, *Sykt Kayu Bersatu Sdn Bhd & Ors* might have been decided differently.

8. If O. 55 RHC were to be examined closely, it is clear the requirement of a memorandum of appeal applies to appeals under O. 49 rr. 2(4) and 3(2) SCR, where after Form 141 is issued, notes of evidence and grounds of decision are available. Certainly, no memorandum of appeal could be prepared, let alone filed, without notes of evidence and grounds of decision.

9. Order 49 r. 6 providing that "Notwithstanding anything contained in this Order", provides a special procedure for a summary or interlocutory decision of the subordinate court independent of the other provisions of O. 49 SCR.

10. Therefore appellants complying strictly with O. 49 rr. 6(2) and 6(3) could be heard without a memorandum of appeal.

As expressly recognised in *Yupaporn Seangarthit* drafters of O. 49 r. 6 SCR, acting under their powers under the Subordinate Courts Rules Act 1955, had the objective of devising a speedy short cut for appeals to the High Court from decisions other than that made after a trial. O. 49 SCR was concerned with the preparation of the records of appeal. Rule 6 thereof, when introduced, sought to do away with the notes of evidence and the grounds of decision, being the two matters long seen as the cause of delay in bringing appeals to the High Court. That much is clear.

The last words of O. 49 r. 6(3) sought to make that clearer still. The confusion is created however by the last five words "or any memorandum of appeal". The "memorandum of appeal" in an appeal is a creature of the RHC, not of the SCR. The memorandum of appeal is in Form 113A of the RHC and O. 55 r. 2 RHC provides the appellant must within 14 days of service upon him of Form 141 of the SCR, being notice that notes of evidence and grounds of judgment/appeal record is ready, serve on the respondents a memorandum of appeal.

The confusion is diminished if one keeps in mind that under O. 49 r. 6 SCR, the effective record of appeal is not prepared by the subordinate court, but by the appellant's counsel, and comprise only the documents, so far as the SCR is concerned, set out in O. 49 r. 6(3) SCR. Since that record has been prepared by the counsel himself no notice in Form 141

SCR by the subordinate court is required to tell him the notes of evidence and grounds of decision is ready. And as lucidly pointed out in *Tan Ah Tee & Anor* and in *Pembinaan Nadzri Sdn Bhd*, without the notes of evidence and the grounds of decision it is quite impossible to prepare a memorandum of appeal.

What then is the appellant left with?

The fact remains that when O. 49 r. 6 SCR was introduced effective 1 August 1993 without a corresponding and complementary amendment in O. 55 RHC, the result is that while O. 55 RHC dealt with appeals generally, it remains effectively silent as to the steps applicable in dealing with excepted category of appeals under O. 49 r. 6 SCR with regard to decisions made by the subordinate court other than a decision made after a trial.

Since O. 55 RHC contains no provisions as to what is to be done with the record compiled under O. 49 r. 6 SCR, the High Court is basically left with nothing to work with on such an appeal but that record. With the record in that form, the High Court is in exactly the same position as the subordinate court judge considering that application. In principle it could make its own decision based on the O. 49 r. 6(3) SCR record.

This is nothing really new or even necessarily absurd, since appeals from the decisions of the registrars of the High Court are handled in the same way. Indeed in *Kemajuan Hunda Kredit (Kuching) Sdn Bhd v. Titus Chuo Mui Ing* [1995] 2 MLJ 542 it has been held that an appeal under O. 49 r. 6 SCR is by way of a rehearing. There is nothing unusual in a higher court conducting an appeal as a rehearing. The Rules of the Court of Appeal (RCA) provide that appeals are a rehearing. However in such appeals, because notes of evidence and grounds of decision are prepared, a memorandum of appeal is properly and reasonably required.

Of course there are several good reasons for the requirement of a memorandum of appeal. It serves to point out errors for future guidance of the subordinate court, where the latter has erred. It gives notice to the respondents the grounds of appeal so that the respondent comes prepared to deal with the arguments raised. It serves to focus submissions to the mistakes. Without the limitation of the memorandum of appeal, the floodgates would be opened for appeals that actually seek a rehearing and hoping to strike lucky on a rehearing. In the extreme it could become an avenue of transfer of hearings of applications from the subordinate court to the High Court, of all things on decisions not even after a trial. To

enable preparation of the memorandum of appeal, notes of evidence and grounds of decision are required. The Subordinate Court Rules Committee would have considered these matters and weighed it against the need to expedite such appeals, and decided upon the introduction of O. 49 r. 6 SCR. While it is true the Subordinate Court Rules Committee has power to make rules for the subordinate courts only and not as to how an appeal is to be dealt with in the High Court, it would be callous for the High Court not to give the SCR cognisance. It has, after all, legislative force.

What might have been done to make matters absolutely clear would be to insert a provision in O. 55 RHC that in respect of appeals under O. 49 r. 6, the High Court shall conduct a rehearing. But failure to do so does not necessarily force a conclusion that O. 55 RHC shall be read as to apply to these appeals, requiring the subsequent preparation of notes of evidence and grounds of decision, and negate or nullify the very purpose of introduction of O. 49 r. 6 SCR.

We are left therefore to interpret O. 49 r. 6 SCR and O. 55 RHC. The first rule of interpretation is the literal interpretation. In this case the literal interpretation is of no assistance since O. 55 RHC is silent as to how appeals under O. 49 r. 6 SCR specifically is to be dealt with. The next approach to interpretation is the purposive approach. Taking this approach, one is left with only one conclusion: that is, that O. 49 r. 6 SCR intends that the appeal in the High Court is to be a rehearing, similar therefore to the appeals from the decision of the registrar to a Judge in Chambers. Where O. 55 RHC is silent on such appeals, the court should not fit such appeals by force into the existing mould of O. 55 RHC where doing so would defeat the purpose O. 49 r. 6 SCR was introduced. In *Regina v. Leicester Crown Court, Ex parte Phipps,* (Times Law Report 22 April 1977) it was said:

> Section 79(3) of the Supreme Court Act 1981 stated that the "customary practice and procedure with respect to appeals to the crown court" shall be observed, but it appeared that there was no customary practice.
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> In *Abse v. Smith* ([1986] QB 536, 555) Sir John Donaldson, Master of the Rolls, recognised the well established principle that every court had inherent power to regulate its own practices, saying that it was "for the judges collectively, as a collegiate body, to decide whether or not to modify general practices" and to modify by practice directions.

But if no practice existed because the situation was so unusual, as in the instant case, the individual judge would himself have to devise a procedure that was fair and just and meet those particular circumstances.

Provided that what he did was not contrary to statute or existing practice, the judge had a right to do it, and if what he did was unfair, an offended party could seek judicial review or appeal against the decision if an appeal existed.

Applying the same principle, the court therefore exercises its inherent powers under O. 92 r. 4 RHC; and orders that this appeal under O. 49 r. 6 SCR be heard on the basis of the record of appeal prepared pursuant to O. 49 r. 6(3) SCR without further requirement of notes of proceedings, grounds of decision and/or memorandum of appeal.